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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 543

W. C. WALLACE, D/B/A WALLACE NOVELTY COMPANY,
Petitioner,

vs.

THE CITY OF CARTERSVILLE, SAM McGOWAN, AS THE MAYOR OF THE CITY OF CARTERSVILLE, J. V. BISHOP, WARREN AKIN, SAM SMITH, AND H. H. GREENE, AS THE BOARD OF ALDERMEN OF THE CITY OF CARTERSVILLE, AND E. J. AUCHMUTEY, AS CHIEF OF POLICE OF THE CITY OF CARTERSVILLE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner herein, W. C. Wallace, by and through his counsel, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above cause on the 15th day of October, 1947, affirming a judgment of the Superior Court of Bartow County, Georgia.

Judgment Below

The judgment of the Supreme Court of Georgia was entered in said cause on October 15, 1947, as shown by page 46 of the transcript of the record, and a motion for rehear

ing in said case was denied on November 14, 1947, as shown by page 49 of the transcript of the record. At the time of preparation of this petition this case had not been reported in any reporter system.

Jurisdiction

The judgment of the Supreme Court of Georgia entered in said cause on October 15, 1947, and a rehearing denied on November 14, 1947, was a final termination in the highest court of the State of Georgia in which a decision could be had of a cause where a right, privilege and immunity was specially set up and claimed by petitioner under the Constitution of the United States; the particular right, privilege and immunity claimed by petitioner being that he should not be deprived of his property without due process of law. The jurisdiction of this Court, therefore, rests on Section 237 of the Judicial Code, as amended (28 U. S. C. A. 344-B), the material portion of which is as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution of the United States."

Question Presented

1. Is a person deprived of his property without due process of law as guaranteed under Section 1 of the 14th Amendment to the Constitution of the United States, where a municipal corporation enacts an ordinance prohibiting the maintaining or operation of "pin-ball" machines which are used solely for the pleasure of the operator and which in

no way involves a gambling transaction and where the operator receives no prize or any other thing of value whatsoever, and where the operation of such machines is for the sole purpose of demonstrating the skill of the operator; whereby the ordinance in question declares such machines to be a nuisance, and subject to abatement by said municipal corporation by and through its constituted authorities; and where no provision is made under the ordinance for notice and hearing before such machines shall be abated as a nuisance.

Specification of Errors

Petitioner contends that the Supreme Court of Georgia erred:

1. In affirming the judgment of the trial Court in holding that the petition did not set out a cause of action for equitable relief by way of injunction.

2. In holding that the ordinance in question did not deprive a person of property without due process of law; and in holding that said ordinance did not violate section one of the 14th Amendment to the Constitution of the United States.

Summary Statement of Matter Involved

On the 10th day of February, 1947, the Mayor and Board of Aldermen of the City of Cartersville, enacted a City ordinance the pertinent parts of which are as follows:

> "From and after the 15th day of February, 1947, it shall be unlawful for any person, firm or corporation, whether the owner or not of the machines hereinafter named, to maintain or operate within the corporate limits of the City of Cartersville, in Bartow County, Georgia, any "pin-ball" machine or similar machine, including all machines operated by depositing a coin therein for the playing of a game or the engaging in of any contest of chance or skill. Provided, that the

provisions of this ordinance shall not apply to machines owned and operated exclusively for the sale of merchandise, where neither the element of chance or skill is involved. The operation and maintenance of the machines prohibited in this ordinance, being conducive to disorder and encouraging to gaming, and a threat and menace to the peace and morals of the community, the same is hereby declared to be a nuisance, subject to abatement and prohibition by said city by and through its constituted authorities."

On the 14th day of March, 1947, and after the effective date of said ordinance, a petition for equitable relief in this cause was filed in the Superior Court of Bartow County, in which petition it was alleged by petitioner that the Chief of Police of the City of Cartersville was threatening confiscation and destruction of certain property belonging to petitioner, to-wit: "pin-ball" machines located in the City of Cartersville; and that said machines were used for amusement only and that the users of such machines received no prizes or any thing of value, that they were not used as gambling devices and were operated solely and exclusively for the pleasure of the users; and further alleged that said ordinance was null and void because it contravened the Constitution of the United States which guaranteed that no person would be deprived of property without due process of law.

The trial Court in the cause where said municipal corporation is located dismissed said petition upon ground one of a general demurrer, ground one of the demurrer being as follows:

1. The petition does not set forth a cause of action.

The Supreme Court of the State of Georgia on the 15th day of October, 1947, affirmed the lower Court and filed its written opinion holding that the ordinance was constitutional and that it did not violate the 14th Amendment to

the Constitution of the United States, and therefore did not deprive petitioner of his property without due process of law.

Reason Relied On for the Allowance of Writ and Brief in Support of Petition

It is the contention of petitioner for certiorari that the ordinance of the City of Cartersville in question operated to deprive petitioner of his property without due process of law. The ordinance, in addition to providing for penal enforcement, provided that his property, "pin-ball" machines, were declared by the ordinance to be a nuisance, and subject to abatement by the constituted authorities of the City. Assuming that this contention is correct we respectfully submit that the refusal of the highest Court in Georgia for equitable relief is subject to review by the Supreme Court of the United States.

The United States District Court and the United States Court of Appeals, in the case of *Mills Novelty Company* v. *Farrell,* 3 F. Supp. 555, 64 F. 2nd 476, held that:

> "Seizure by police officers of automatic vending machines which do not constitute gambling devices deprived owners of property without due process of law, and was violative of the privileges and immunities clause of the Constitution of the United States."

The Court of Civil Appeals for the State of Texas, in the case of *Sheppard* v. *Giebel,* Texas Civil App. 110 S. W. 2nd 116, held that:

> "Provision of act levying occupation tax upon coin operated vending machines authorizing comptroller to destroy such property summarily for nonpayment of tax and without a hearing, was unconstitutional as in contravention of Section one of the 14th Amendment to the United States Constitution, since such machines were not nuisances per se."

The code of Georgia of 1933, in providing for abatement of nuisances in municipalities by Section 72-402, provides that reasonable notice shall be given to the parties interested, of the time and place of hearing to determine the question of abatement.

The ordinance in question did not make provision for any kind of hearing or notice to the parties interested.

The Supreme Court of Georgia, in a unanimous decision in the case of *Western and Atlantic Railroad Company, et al.* v. *City of Atlanta, et al.*, 113 Georgia, 537, held as follows:

> "Save and except as to those things which are by the common or statute law declared to be nuisances per se, or which are in their very nature palpably and indisputably such, neither the municipal authorities of any city of this State, nor any department thereof which has been given the power to abate nuisances, has the legal right summarily to compel the abatement of a particular thing or act as a nuisance, without reasonable notice, to the person alleged to be maintaining or doing the same, of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance."

The Court of Appeals of Georgia in the case of *Williams* v. *The State*, 65 Ga. App., 843, held as follows:

> "The evidence failed to show that the machines would automatically or otherwise pay a prize, or that a prize was being given in connection with their operation. To constitute gaming under the statute three elements are essential: (1) a consideration, (2) a chance, and (3) a prize. Barker *v.* State, 56 Ga. App. 705 (193 S. E. 605). In the instant case the proof failed to show the presence of the third element, and failed to show that the machine or device in this case was, per se, a gambling device such as is commonly known as a gambling coin-in-the-slot machine, which automatically and per chance pays off in coins or other things of

value. Under the statute now under consideration it is unlawful to maintain, keep, employ and carry on a ball machine, or other device operated similarly to such described slot machines. But the evidence in the instant case was insufficient to so classify the device here involved."

We respectfully submit that since "pin-ball" machines have been held by the Courts of Georgia to be lawful and legitimate property, and that since no notice was provided for in the ordinance in question, as required by the Code of Georgia, that an attempt or threat to confiscate and destroy such property would be the subject matter of injunction and equitable relief, as being in contravention to the rights guaranteed under Section one of the 14th Amendment to the Constitution of the United States, which guarantees that no person shall be deprived of property without due process of law.

Respectfully submitted,

JEFFERSON L. DAVIS,
Counsel for Petitioner.

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OCTOBER TERM, 1947

No. 543

W. C. WALLACE, D/B/A Wallace Novelty Company, Petitioner.

Vs.

THE CITY OF CARTERSVILLE, SAM McGOWAN, As The Mayor Of The City Of Cartersville, J. V. BISHOP, WARREN AKIN, SAM SMITH And H. H. GREENE, As The Board Of Aldermen Of The City Of Cartersville, And E. J. AUCHMUTEY, As Chief Of Police Of The City Of Cartersville,

Respondents.

BRIEF FOR RESPONDENTS OPPOSING WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Respondents adopt as substantially true the statements of petitioner, W. C. Wallace, by and through his counsel, praying that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above stated case on the 15th day of October, 1947, affirming a judgment of the

Superior Court of Bartow County Georgia, as contained in his petition down to

"Reasons relied on for allowance of the writ—" on page 5 of his petition.

REASONS RELIED ON BY RESPONDENTS FOR DENIAL OF WRIT AND BRIEF IN SUPPORT OF MOTION TO DENY.

Under the Charter powers granted to the City of Cartersville, Georgia, Laws of 1937, pages 1532-95, of which this court will take judicial cognizance, the State of Georgia delegated to respondent the powers contained therein, and we quote therefrom:

> "Section 1. The inhabitants of the territory now embraced in the corporate limits of the City of Cartersville, in Bartow County, Georgia, shall continue to be, and are hereby incorporated under the name and style of the 'City of Cartersville' —and vested with all rights, powers and privileges incident to muncipal corporations in this state or cities thereof,—may by its corporate name sue and be sued, contract and be contracted with, plead and be impleaded, have and use a common seal; make and enact through its Board of Aldermen such ordinances, by-laws, rules, regulations and resolutions for the transaction of its business, and the welfare and proper government of said city, as to said Board of Aldermen, may seem best, and which may be consistent with the laws of the State of Georgia and the laws of the United States."
>
> "Section 4. The municipal government of said city shall vest in a governing board to be

known as 'The Board of Aldermen of the City of Cartersville' and shall consist of a Mayor, from the City at large and four Aldermen, one from each of the four wards,—

"The Board of Aldermen of the City of Cartersville shall have all powers of government in and of said City of Cartersville, except as may be expressly provided herein."

The general welfare powers of the said city are found in Section 60 of said Charter, to-wit:

"Section 60. The Board of Aldermen of the said City of Cartersville, shall have power and authority to pass all laws and ordinances that they may consider necessary for the peace and good order, health, prosperity, comfort, and security of said City and the inhabitants thereof, and that may be necessary to foster virtue and good morals in said city, to suppress lewdness, gambling, disorderly conduct and to enforce such laws and ordinances by such penalties as are authorized by this charter. The said Board of Aldermen shall have full power to adopt and enforce any and all ordinances they may consider advisable or necessary to carry out this charter, to make and enforce such ordinances, rules and regulations for the government of their body and all the offices of said city, and do any and all other acts and exercise all other powers conferred upon them by this charter, and that may be done or exercised under the laws of this state, conferring powers upon municipal corporation—".

Section 78 of the charter of said city empowers the Board of Aldermen to declare by ordinance what shall be a nuisance in said city, to-wit:

"Said Board of Aldermen may by ordinances

declare what shall be a nuisance in said city and provide for the abatement of same."

The City of Cartersville is within a proper exercise of the police power delegated to it by the State of Georgia in its charter.

The validity of such an act or ordinance as affected by the due process cause of the Federal Constitution was decided in **Murphy** vs. **California** 225 U. S. 623, 41 L. R. A. (N. S.) 153. The opinion in that case was written by Mr. Justice Joseph Rucker Lamar. The City of South Pasadena, California, in pursuance of police power conferred under the Constitution of that state, passed an ordinance prohibiting any person from keeping or maintaining a billiard or pool room establishment for hire and public use. The constitutional provision applicable is as follows:

> "Any County, City, Town, or Township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws;" Article 11, Section II, Constitution of California.

In the opinion of the Supreme Court it was said:

> "The 14th Amendment protects the citizen in his right to engage in any lawful business but it does not prevent legislation intended to regulate useful occupations which, because of their nature, or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations which may or may not be harmful to

the public, according to local conditions or the manner in which they are conducted. Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on Plaintiff's application for Habeas Corpus, a nuisance per se. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant. That the keeping of the billiard hall has a harmful tendency is a fact requiring no proof and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the items and other evils which result from the maintenance of resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game, but at the place; and where in the exercise of the police power the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go beyond their finding and inquire in the local condition or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the order. As said in **Booth** vs. **Illinois** 184 U. S. 425,429; 'A calling may not in intself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious if,—the state thinks that certain

admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot enter in, unless, looking through mere form and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of the rights secured by the fundamental law,—".

The decision which the petitioner seeks to review by Writ of Certiorari, decided October 15, 1947, cites many authorities of the State of Georgia and of the Supreme Court of the United States, showing that the courts of Georgia and the Federal Court as well have upheld the constitutionality of such ordinances in so far as they pertain to alleged violations of property rights, and in that decision the courts properly brush aside allegations in the petition to the effect that certain city officials in their individual capacity had in conversation lead the petitioners to believe that "Pin-ball" Machines would be licensed by the City of Cartersville as of no binding force upon the City of Cartersville and could not nullify a regularly enacted ordinance upon the subject matter. In his original petition the petitioner never charged any acts confiscating his machines except mere conclusion that to refuse him license would in effect destroy his property rights in said machine.

The Supreme Court of Georgia, therefore, was auth-

orized and required to uphold respondent, The City of Cartersville, in its right to enact the ordinance in question. We respectfully request that the Supreme Court of the United States refuse to grant the Writ of Certiorari to the Supreme Court of Georgia.

Respectfully submitted,

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